common SENSE

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PRESIDENT'S MESSAGE

TORT REFORM: OUR PERMANENT ISSUE

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Predictably, the subject of tort reform receded from the media spotlight when the democrats became the majority party in Congress. Although organized medicine cannot continue to place tort reform at the top of its national lobbying agenda at this time, it remains an important issue in state legislatures. Furthermore, beyond the necessity of lobbying legislatures, organized medicine has a duty to explain this issue to our patients and the general public.

Reform of our reckless tort system remains an absolute necessity for the future vitality of the medical profession. Most emergency physicians work 2-3 months per year to pay their malpractice insurance premiums and to continue feeding the litigation industry. This industry generates a tidal wave of litigation against physicians, with more than 80% of all cases having no basis in fact.[1] Furthermore, the ability of a plaintiff to recover damages has no correlation with fault.[2] The ability to recover damages only correlates with the presence of an injury. This evidence proves that we have a broken tort system. We must look to state legislatures to provide relief.

According to the Tenth Amendment to the U.S. Constitution, states have the power to legislate in the area of healthcare. We have federal healthcare laws largely because of Congress' spending powers. Because Congress now pays for more than 40% of all healthcare in our country, it has the power to make many of the rules relating to federal healthcare programs. The Federal Department of Health and Human Services issues healthcare regulations through power delegated to it by Congress. These powers exist as exceptions to the general rule that states primarily legislate in the area of healthcare.

Thus, we should turn our attention to the states in our effort to improve our tort system. For many years, legal commentators cited California's Medical Injury Compensation Reform Act of 1975 (MICRA) as a model for state medical liability reforms.[3] MICRA limits liability for non-economic damages to $250,000 in medical malpractice cases, allows defendants to inform juries of other means of recovery available to plaintiffs (collateral source rule), places limits on attorney fees, requires a 90 day notice before filing professional negligence suits, shortens the statute of limitations, provides for periodic payment of damages and allows patients and healthcare providers to agree to binding arbitration. MICRA resulted in significantly lower insurance premiums compared with similarly situated states.

Now, the 2003 reforms in Texas may serve as the ultimate model for state tort reform coalitions. Texans first passed an amendment to their state constitution allowing their proposed reforms.[4] This prevented the plaintiff bar from carrying out their

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routine of challenging the constitutionality of tort reforms in state courts. The Texas reforms provided for a $750,000 cap on non-economic damages, product liability reform and changes to punitive damage and strict liability laws.[5] At least five insurance companies significantly decreased the cost of premiums in Texas within the first two years after enactment of the Texas reforms. By 2005, the volume of malpractice suits in Harris County (Houston) dropped to 50% of the 2001-2002 level.[6] This resulted in a net gain of 689 physicians, or 8.4%, in Harris County during that period of time.

In 2005, the AAEM board of directors approved the AAEM White Paper on Tort Reform.[7] This paper describes both an immediate and long term strategy to changing our tort system. The immediate strategy intends to stem the hemorrhage, while the long term strategy aims to stop the cause of bleeding. Short term reforms include caps on awards to plaintiffs, decreasing the statutes of limitations (the time during which a plaintiff must file suit), screening panels for medical malpractice suits, eliminating the collateral source rule, periodic payment of damages, limiting punitive damages and making such damages payable to the state.

However necessary, many of these short term reforms limit patient rights and are not narrowly tailored toward the causes of the liability crisis. Therefore, AAEM prefers to focus on long term changes, narrowly tailored to the causes of the liability crisis, bringing profound changes to our tort system and significant relief to society. Only the U.S. has a liability crisis because we have the world's most aberrant tort system and more than 75% of the world's attorneys.

The aberrant qualities of our tort system lead to aggressive, and even reckless, litigation, much of which is groundless, distorting our economy and draining valuable resources from more productive sectors of society. Thus, instead of reforming our tort system in ways that may limit patient rights, we should focus our efforts on the primary cause of our liability crisis: attorney behavior.

Some American practices that exist almost nowhere else in the world include contingency fees, whereby a plaintiff attorney gets a percentage of their clients' winnings, and the "American Rule," whereby each party in a civil suit pays its own attorney fees and court costs. Most countries follow the "English Rule," where the loser pays everyone's attorney fees and court costs. Banning contingency fees and adopting the "English Rule" would go a long way toward limiting groundless litigation.

Other proposed reforms would eliminate an ever-expanding list of new tort actions, including negligent infliction of emotional distress, bystander emotional distress, expanded third party liability and special circumstances (e.g., fear of cancer, fear of AIDS). The "lost chance" doctrine perhaps represents the most pernicious example of a new tort action resulting in expanded liability. Here, a plaintiff only has to prove loss of a chance of a better outcome.

AAEM also supports the right of a defendant to countersue plaintiffs and their attorneys for negligent institution of a lawsuit. Currently, in every state, a defendant must prove malice to file such a countersuit. Other reforms supported by AAEM include measures to increase expert witness accountability and the creation of administrative health courts to replace the current jury system in medical malpractice cases.

We may not achieve any of our proposed long term reforms in the near future, nor should we attempt to place them on a lobbying agenda at this time. However, lobbying should not be our only strategy. Education of the public has great value and has the potential to influence our political process in a more profound manner.

AAEM has an active tort reform committee, chaired by our Vice President, Howard Blumstein. I encourage any interested member to apply for membership on this committee by contacting our home office at info@aaem.org. Of course, no specialty society acting alone can change our tort system. I strongly encourage you to join the American Medical Association and your state and county medical societies. We have much greater strength when acting together with our medical colleagues.

Finally, I recommend membership in the American Tort Reform Association. By visiting their website at www.atra.org, you will learn about state tort reform coalitions. These coalitions link physicians with other victims of our unfair tort system including other professionals, small business people, large corporations, school districts, insurance companies and countless other sectors of our economy damaged by the litigation industry. When physicians from all specialties join forces with the many other people involved in state tort reform coalitions, successful tort reform in states will become an irresistible force. Significant tort reforms in California, Texas, Louisiana, Mississippi and a growing list of other states prove the fact that the plaintiff bar cannot prevail over common sense forever.

1 New Engl J Med 1991; 325:245-251
2 New Engl J Med 1996; 335:1963-1967
3 MICRA, codified at Cal. Civ. Code 3333.1, 3333.2; Cal. Bus. Prof. Code 6146; Cal. Code Civ. Proc. 340.5, 364, 365, 667.7, 1295.
4 Texas Proposition 12 (2003).
5 Texas H.B. 4 (2003).
6 Houston Chronicle, May 17, 2005.
7 Weiss LD, Li J. The AAEM white paper on tort reform. J Emerg Med 2006; 30:473-475.